MALAYAN UNITED FINANCE BHD.

v.

POLY PLASTICS (M) SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
RICHARD TALALLA JC
[ORIGINATING SUMMONS NO. 31-849 OF 1987]
27 MAY 1990

COMPANY LAW: *Charge - Whether requires registration by donee - Powers incidental to management of company - Whether has to be expressly stated in memorandum and articles of association - Rectification - Sections 20(1) and 108 Companies Act.*

LAND LAW: *Charge created under a power of attorney -Enforcement - Statutory notice - Order for sale - Onus before Court refuses - Sections 216(1)(a), 255, 256, 257 National Land Code - Charge executed by attorney - Whether exceeded powers of instrument.*

REVENUE LAW: *Ad Valorem - Principal only or principal and interest - Sections 14, 28 Stamp Ordinance.*

The defendant, P, is the registered proprietor of the said land. PD was the previous owner. P was the attorney of PD and as such executed a charge over the land in favour of the plaintiff's, M, to secure repayment of a sum of 4 million which M lent to P. On execution and registration of the charge, P became the registered proprietor; P defaulted in the repayment whereby M issued a statutory notice under s. 255 of the National Land Code (the Code). P failed to pay and M commenced this action for an order for sale of the land by public auction pursuant to ss. 256 and 257 of the Code.

Held:

[1] An examination of the power of attorney shows that it was well within P's power to charge the land to M.

[2] Form 16E of the Code which accompanied the letter dated 26 May 1987 from M to P requesting full payment of the sum was not premature and invalid just because it was served on the same day as the letter; the Form 16E notice was clear in its terms and at most the demand contained in the letter of 26 May 1987 was redundant.

[3] There is no legal requirement for P to register the charge under s. 108 of the Companies Act as sub-section (1) refers to a charge created by a company. In this case the charge was created by PD; notwithstanding this, by virtue of s. 216(1)(a) of the Code, M can enforce the charge as if P was a party to the charge.

[4] It is an incident of management for a company to carry out its functions by an attorney and there is no necessity for it to be specifically empowered to do so by its articles of association; also see s. 20(1) of the Companies Act.

[5] Pursuant to ss. 14 and 28 of the Stamp Ordinance 1949, *ad valorem* duty was payable only on the principal sum; the charge was therefore sufficiently stamped - see *Development and Commercial Bank Bhd. v. Che Wan Development Sdn. Bhd.*

[6] Under the charge document, the plaintiff's had a discretion and was free to decide the rate of interest.

[7] P has failed to discharge the onus placed on them by s. 256(3) of the Code.

[Order for sale made and affirmed.]

Cases referred to:
Subramania Pillay v. Sundarammal [1968] 2 MLJ 115
Magnum Finance Bhd. v. Ling Sing Ping [1988] 2 MLJ 403
Danby v. Coutts & Co. [1885] 29 Ch D 500
Development & Commercial Bank Bhd. v. Che Wan Development Sdn. Bhd. & Ors. [1989] 1 CLJ (Rep) 469
Nira Sdn. Bhd. v. Malayan Banking Bhd. [1990] 1 CLJ (Rep) 219
Phuman Singh v. Kho Kwang Choon [1965] 2 MLJ 189
Keng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd. & Ors. [1983] 2 MLJ 384
Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee [1983] CLJ (Rep) 387

Legislation referred to:
Companies Act 1965, ss. 20(1), 198
Contracts Act 1950, s. 79
National Land Code 1965, ss. 216(1)(a), 255, 256, 256(3), 257, Form 16E
Rules of the High Court 1980, O. 56 r. 2(2)
Stamp Ordinance 1949, s. 28

Other source referred to:
For the plaintiffs - T.S. Chong; M/s. Chong & Co.
For the defendants - Murthi; M/s. Murthi & Partners

JUDGMENT

Richard Talalla JC:

The defendant's whom I shall refer to as Poly Plastics are the registered proprietors of two pieces of land held under Perakuan Pendahuluan Mengenai Hakmilik Pegangan No. 512 and Pegangan No. 513 situated in the Pecahan Bandar 14 Daerah Timur Laut, Pulau Pinang (hereinafter referred to as the 'land'). Pan Diamond Development Sdn. Bhd. (Pan Diamond), were the previous registered proprietors of the land. Poly Plastics were the attorney of Pan Diamond and as such executed a charge over the land in favour of the plaintiff's to secure repayment on demand to the plaintiffs of a sum of RM4,000,000 which the plaintiff's had lent to or advanced for the benefit of Poly Plastics. The loan carried interest at the rate of 3.5% per annum above the plaintiff's base lending rate or such other rate as may from time to time be substituted therefore and at monthly rests. Poly Plastics agreed that until such demand was made they would pay the principal sum with interest by 24 equal monthly instalments.

It was after the execution and registration of the charge that Poly Plastics became the registered proprietor of the land. They took the land subject to the charge. By virtue of s. 216(1)(a) of the National Land Code 1965 (the Code) the plaintiff's are entitled to enforce the charge against Poly Plastics as if Poly Plastics were a party to the charge.

Poly Plastics defaulted in the payment of the instalments. The plaintiffs demanded payment. Poly Plastics did not pay. In consequence the full amount of the monies owing under the charge, that is to say the principal sum and interest, became payable. The plaintiffs issued a statutory notice under s. 255 of the Code demanding payment for the principal sum and interest. Poly Plastics still did not pay. Accordingly the plaintiffs commenced this action wherein they are seeking an order for sale of the land by public auction pursuant to ss. 256 and 257 of the Code.

Poly Plastics in seeking to oppose the application are taking up a number of points.

The first point raised by Poly Plastics was that the charge was executed in excess of the powers granted to them by Pan Diamond. Reliance was placed on the Federal Court case of *Subramania Pillay v. Sundarammal* [1968] 2 MLJ 115 which is authority for the proposition that powers of attorney are to be construed strictly and where the act of the donee is challenged as being in excess of the given power, the power is to be ascertained from within the 4 corners of the instrument by which the power is granted either in expressed terms or by necessary implication. Counsel for Poly Plastics invited me to follow the decision in *Magnum Finance Bhd. v. Ling Sing Ping* [1988] 2 MLJ 403. In that case the defendant's attorney charged the defendant's property to the plaintiff. The defendant explained that the attorney did this without his knowledge, in excess of his authority and for purposes in no way connected with the power. The plaintiff did not dispute the defendant's complaint but simply said that it owed no duty of care to the defendant to inquire into the attorney's authority under the power of attorney, as the power to charge was expressly stated on the face of it. Siti Norma Yaakob J followed *Danby v. Coutts & Co.* [1885] 29 Ch. D. 500 where it was held that the recitals in a power of attorney controlled the generality of the operative part of the power of attorney. Her Ladyship found that the plaintiff did not bother to look at the agreement nor was it concerned with the legal construction of the power of attorney and that inasmuch as the charge created was a third party charge the plaintiff owed a duty to inquire into the circumstances surrounding the execution of the power of attorney, its purpose and the limitations imposed on it by law. That case is distinguishable from the present one. The facts in that case are a far cry from the facts in this. Here the power of attorney, in its preamble, speaks to Pan Diamond entering into an agreement with Poly Plastics to borrow RM3,000,000 on the security of the land and to execute an irrevocable power of attorney in favour of Poly Plastics giving them power to charge and transfer the land. In the body of the document the power given is to charge the land to any bank or financial institution for a loan in favour of Poly Plastics and to transfer the same to Poly Plastics or to any other person at their discretion. It is expressly stated in the document that the power of attorney should be irrevocable until the loan of RM3,000,000 has been fully repaid to Poly Plastics or until the land has been transferred to Poly Plastics. The land has been so transferred. Pan Diamond have not made any complaint. I see no reason why Poly Plastics should be contending that the power of attorney is inadequate when Poly Plastics itself had all the benefit of the loan and is itself now the registered proprietor of the land.

The second point is that Clause 12(a) of the charge provides that in the event of any breach by the chargor (Pan Diamond) or the borrower (Poly Plastics) of any of the terms pertaining to payment of any of the instalments or any sum outstanding it shall be lawful for the chargee (the plaintiff's) to demand full payment of the principal sum and all sums outstanding from the chargor in pursuance of s. 255 of the Code. By letter dated 26 May 1987 from the plaintiff's solicitors to Poly Plastics the latter were informed that they had committed a breach of the provisions of the charge by defaulting in payment of the instalments, interest and bank charges and that by virtue thereof it was lawful for the plaintiff's to demand full payment pursuant to s. 255 of the Code and as provided for under Clause 12(a) of the charge. Forwarded with that letter was a demand for payment in Form 16E of the Code. The form included notice that if the sum of RM5,287,857.35 was not paid within 1 month of the service of that notice, the solicitors should apply for an order of sale. The letter also contained a notice that unless the principal sum with interest thereon and other payment was paid to the plaintiff's within 1 month of the receipt of the letter, the plaintiff's solicitors had instructions to apply for an order of sale of the land without further reference to Poly Plastics.

Poly Plastics now argue by way of their second point that by the said letter they were given 1 month to pay. Therefore the Form 16E demand could not be made on the same day and accordingly the Form 16E notice was premature and invalid and it had to follow that the whole of these proceedings are null and void. I do not agree. The Form 16E notice was clear in its terms and at most the demand contained in the letter of 26 May was redundant.

Thirdly it is argued on behalf of Poly Plastics that since it became the registered proprietor of the land there has been no registration of the charge in the Companies Registry as required by s. 108 of the Companies Act 1965. The plaintiffs' answer to that is that there is no legal requirement for Poly Plastics to proceed under s. 108 because sub-section (1) of that section necessitates registration only where a charge is created by a company. They say that it was Pan Diamond that created the charge which, incidentally, they did register under the section, but no new legal charge has been created by Poly Plastics. Even if they were required so to register the default is theirs. They cannot take it to the disadvantage of the plaintiffs who at any rate are entitled to enforce the charge as if Poly Plastics was a party to the charge by virtue of s. 216(1)(a) of the Code. I find in favour of the plaintiffs in this regard.

Poly Plastics fourth point is that the memorandum and articles of association of Pan Diamond do not authorise Pan Diamond to appoint any other corporation as its attorney to execute a charge of its property for the benefit of a third party. The plaintiffs' answer to that is that there is nothing in the memorandum and articles of association of Pan Diamond and Poly Plastics which prohibits the creation of the charge. As I see it, it is an incident of management for a company to carry out its functions by an attorney and there is no necessity for it to be specifically empowered to do so by its articles of association. Article 74 of *Pan Diamond's Articles of Association* gives its directors authority to exercise all the powers of the company to borrow money and to charge its property as security for any debt liability or obligation of any third party. Poly Plastics say that the article is *ultra vires* its objects inasmuch as it allows the directors to charge the company's property to a third party. I do not think so. Clause 3 of Pan Diamond's memorandum contains its objects. Sub-clause (32) empowers it to borrow or raise money or to secure the payment or repayment of money or the satisfaction, observance or performance of any obligation or liability undertaken or incurred by the company. Sub-clause (52) allows it by charge to secure and guarantee the performance by itself of any obligation or liability it may undertake. Sub-clause (32) is wide in its terms. Sub-clause (52) is wide in its terms. Sub-clause (52) permits Pan Diamond to guarantee performance of any obligation or liability. Section 79 of the Contracts Act 1950 defines a contract of guarantee as a contract to perform the promise, or discharge the liability, of a third person in case of his default. In any event there are the provisions of s. 20(1) of the Companies Act 1965 which provides that no act of a company including any act done by its agent under any purported authority and no transfer of property real or personal to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to do the act or to execute or take the transfer.

Poly Plastics' fifth point is that the charge was insufficiently stamped by reason of the fact that *ad valorem* duty was paid only to the principal sum and the interest was not included. The argument put forward on behalf of Poly Plastics apparently was that as and when interest became due under the charge, stamp duty became payable on accrued interest. Counsel for the plaintiffs replied that stamp duty was only payable on the principal sum stated in the charge. Reference was made to s. 28 of the Stamp Ordinance 1949 which states that a security for the payment or repayment of money to be then advanced or paid shall be charged where the total amount secured or to be ultimately recoverable is in any way limited, with the same

duty as a security for the amount so limited. In this case the security was for a limited amount and therefore the charge must be held to be sufficiently stamped, a fortiori by reference to s. 14 of that Act which provides that when interest is expressly made payable by the terms of an instrument, such instrument shall not be chargeable with duty higher than that with which it would have been made therein. In this regard see *Development & Commercial Bank Bhd. v. Che Wan Development Sdn. Bhd. & Ors.* [1989] 1 CLJ (Rep) 469 at p. 472.

The sixth point was that the claim in these proceedings was for interest at the rate of 16.5% per annum whereas Clause 1 of the charge provided for interest to be paid at the rate of 3.5% above the plaintiff's base lending rate. It was argued that there must be evidence of the substituted rate and there was no such evidence. The plaintiffs' answer is that under Clause 1 of the charge they were at liberty to charge interest at such other rate as may from time to time be substituted for the rate of 3.5% per annum above their base lending rate. They had a discretion and were free to decide the rate of interest. Pursuant to Clause 7(a) of the charge their decision is stated to be final and conclusive and shall not be questioned on any account whatsoever. In the event of Poly Plastics' default they were liable to pay the plaintiffs additional interest at the rate of 3% above the ruling rate on the instalments or any other sum in arrears. Finally under Clause 21 the amount shown in any demand for payment of money made by an authorised officer of the plaintiff's shall be final and binding on Poly Plastics and accepted by them as being correct. The plaintiff's further submitted that they made repeated demands for payment to Poly Plastics who never disputed any of them. Therefore Poly Plastics should not be allowed to turn up at this late stage and dispute the amount of interest. The view I take is that the plaintiffs' claim for interest is on the face of it in terms of the charge and accordingly valid. It is for Poly Plastics to show cause to the contrary which they have not done.

Lastly it was represented on behalf of Poly Plastics that issues of fact were raised. These proceedings were instituted by originating summons which was not the proper procedure, so it was contended. Order 28 r. 8 of the Rules of the High Court 1980 empowers the Court to order these proceedings to continue as if begun by writ should it for any reason appear to the Court that that should be done. I asked Counsel for Poly Plastics what the issues of fact were. He replied, the amount of interest and the agreement referred to in the power of attorney. As already stated the onus is on the defendant to show cause why an order for sale of the land should not be made. Poly Plastics offered nothing pointing to a factual issue in regard to interest. In this regard see the Supreme Court case of *Nira Sdn. Bhd. v. Malayan Banking Bhd.* [1990] 1 CLJ (Rep) 219. As to the power of attorney, Poly Plastics is the donee. As to the agreement referred to in the power of attorney, it was between Pan Diamond and Poly Plastics. I do not see that it had anything to do with the plaintiff's or the plaintiff's claim herein. If it did in any way affect the claim to the end that there should be no order for the sale of the land, Poly Plastics should have produced the agreement, pointed out the issues of fact between them and the plaintiff's and thus established cause against an order for sale of the land.

On the other hand Counsel for the plaintiffs assured me that there were only 3 reported cases where the Court had refused to make an order under s. 256(3) of the Code. They were *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee* [1983] CLJ (Rep) 387 which was a case involving fraud, *Phuman Singh v. Kho Kwang Choon* [1965] 2 MLJ 189 which was a case of contravention of the Moneylenders Ordinance (Cap 114) and *Keng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd. & Ors.* [1983] 2 MLJ 384 which related to unreasonable conduct on the part of the lender which case was overruled by the Privy Council.

In the end I find that Poly Plastics have failed to discharge the onus placed on them by s. 256(3) of the Code. Accordingly on 4 March 1990 I ordered the sale of the land and costs of application to the plaintiff.

Poly Plastics duly applied for adjournment of the matter into Court for further argument. That application was allowed and further argument was heard today. Pursuant to the provisions of O. 56 r. 2(2) the Judge may "set aside the order previously made and make such other order as he thinks fit." I make no further order. The order made on 4 March therefore stands.

Also found at [1990] 2 CLJ 808